a

M VASAGAM MUTHUSAMY

v.

KESATUAN PEKERJA-PEKERJA RESORTS WORLD, PAHANG & ANOR

b

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[ORIGINATING MOTION NO: R2-25-39-1999]
12 DECEMBER 2002

c ***ADMINISTRATIVE LAW:*** *Judicial review - Industrial Court - Decision of - Whether findings based on error of law - Whether there were procedural improprieties - Whether certiorari should be granted*

This was an application by the applicant against the decision of the second
d respondent ('the Industrial Court') dismissing the applicant's action seeking reinstatement upon termination of his services by the first respondent. In handing down the award, the second respondent held that the applicant's contract of employment with the first respondent was a genuine fixed term contract, and that therefore the first respondent had a right not to renew the said contract upon expiry. The applicant, however, contended that the Industrial Court had
e erred in law in reaching its decision.

Held:

[1] The applicant's contention that the Industrial Court had erred in law when it doubted the testimony of a witness of the applicant, had no place in an
f application for judicial review, where it was trite law that findings of facts based on the credibility of witnesses could not be challenged. (p 455 b-d)

[2] The applicant's submission that the first respondent's decision not to renew the applicant's contract of employment was procedurally wrong, could not
g be valid ground to consider in the instant application. Procedural impropriety could only be a ground for judicial review when the procedural error was committed by the Industrial Court in making the award. (p 456 b-d)

[3] Even if there was an irregularity, the ultimate issue remained whether or
h not the contract was a genuine fixed term contract, and since there was a genuine fixed term contract, whatever irregularities complained of had no bearing on the question of the claimant's contract coming to an end. (p 456 g)

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[4] Since the Industrial Court had found that there was a genuine fixed term contract, the question of there being a dismissal or not did not arise as the dissolution of the contract upon reaching the expiry date of the fixed term would clearly spell the end of the worker's tenure with the relevant company. (p 458 c-d)

[Application dismissed.]

Case(s) referred to:

Han Chiang School, Penang Han Chiang Associated Chinese Schools Association v. National Union of Teachers in Independent Schools, W Malaysia [1988] 1 ILR 611 ***(dist)***

Hotel Equatorial (M) Sdn Bhd v. National Union of Hotel, Bar & Restaurant Workers & Anor [1984] 2 CLJ 6; [1984] 1 CLJ (Rep) 155 FC ***(refd)***

Malayan Banking Berhad v. Association of Bank Officers, Peninsular Malaysia & Anor [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) 183 SC ***(refd)***

Minister of Home Affairs v. Persatuan Aliran Kesedaran Negara [1990] 1 CLJ 699; [1990] 1 CLJ (Rep) 186 SC ***(foll)***

Quah Swee Khoon v. Sime Darby Bhd [2001] 1 CLJ 9 CA ***(refd)***

R Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 101(1), 103

Industrial Relations Act 1967, ss. 20, 33B(1)

For the applicant - P Jayasingam; M/s Zul Rafique & Partners

For the respondents - A Ramadass; M/s Ramadass & Assocs

[The applicant has appealed to the Court of Appeal vide Civil Appeal No: W-04-6-2003]

Reported by Suresh Nathan

JUDGMENT

Faiza Tamby Chik J:

The brief facts of the case are as follows: The applicant was a former employee of Harrisons Malaysian Plantations Berhad until his retirement from service on 31 December 1990. After his retirement from Harrisons Malaysian Plantations Berhad, the applicant was employed by Tan Chong Motors & Sons Sdn Bhd as a Public Relations Coordinator from 2 January 1991 to 30 September 1992. Whilst the applicant was employed with Harrisons Malaysian Plantations Berhad and Tan Chong Motors & Sons Sdn Bhd, the applicant held the position of

Honorary General Secretary of the National Union of Commercial Workers from 23 January 1972 to 30 July 1992. Sometime in January or February 1993, the applicant was offered employment as Industrial Relations Manager of Cold Storage (M) Sdn Bhd at a salary of RM4,500 per month. At about the same time, the applicant was approached by the President and Honorary Secretary of the 1st respondent, to take up employment with the 1st respondent as its executive secretary at a salary of RM1,500 per month. The applicant chose to accept the offer of employment by the 1st respondent. By a letter dated 15 April 1993, the 1st respondent offered the applicant employment as its executive secretary with effect from 15 April 1993 for a period of one year at a salary of RM1,500 per month. Pursuant to the terms of the applicant's contract of employment, the applicant was entitled to a meal allowance of RM100 per month together with a contractual bonus of two months salary. The applicant was further informed that his terms and conditions of employment with the 1st respondent would be in line with the collective agreement between the 1st respondent and Resorts World Berhad together with any Industrial Court award governing the terms and conditions of employment. The duration of the applicant's employment with the 1st respondent was expressly stated as follows:

> Duration of Employment
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> This appointment is for a period of one (1) year and subject to renewal at the discretion of the Resorts World Employees Union.
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> (See Exhibit "V1" attached to the Affidavit affirmed by the Applicant on 25th March 1999.)

It is observed that at the 1st respondent's council meeting held on 8 January 1994, without consulting the applicant, the 1st respondent resolved to extend the applicant's contract of employment for a further one year period from 15 April 1994 to 15 April 1995. The applicant was not given any letter by the 1st respondent confirming the extension of his contract of employment from 15 April 1994 to 15 April 1995 and the applicant continued working for the 1st respondent after his contract of employment expired on 15 April 1994. By a letter dated 23 April 1994, the applicant was informed by the 1st respondent that he was given an annual increment of RM140 and that his salary would be adjusted to RM1,650 per month. (See exh. "V2" attached to the affidavit affirmed by the applicant on 25 March 1999.) As the applicant's contract of employment was due to expire on 15 April 1995, the 1st respondent without consulting the applicant, informed the applicant *vide* a letter dated 17 April 1995 that it had decided to renew the applicant's contract for a further year from 15 April 1995 to 15 April 1996. (See exh. "V3" attached to the applicant's affidavit affirmed on 25 March 1999.) By a further letter dated

17 April 1995, the 1st respondent informed the applicant that it was not able to give the applicant an increment this time, but will consider giving the applicant the increase in food allowance of RM40 per month which was given to the staff of Resorts World Berhad under the new collective agreement. (See exh. "V4" attached to the applicant's affidavit affirmed on 25 March 1999.) Despite the fact that the applicant's terms and conditions of service were in line with the collective agreement between the 1st respondent and Resorts World Berhad the 1st respondent failed to give the applicant a salary increase of RM100 and food allowance increase of RM40 which was payable to the staff of Resorts World Berhad under the terms of the collective agreement between the 1st respondent and Resorts World Berhad which came into force on 1 August 1994. Without any warning or notice, the secretary of the 1st respondent informed the applicant *vide* a letter 14 April 1996 that it was not renewing the applicant's contract of employment upon its expiry on 15 April 1996. No reasons were given in the said letter as to why the 1st respondent did not renew the applicant's contract of employment other than that the applicant's contract would expire on 15 April 1996. (See exh. "V5" attached to the applicant's affidavit affirmed on 15 March 1999.) By a letter dated 24 April 1996, addressed to the Honorary Acting Secretary of the 1st respondent, six out of the ten council members who attended the executive council meeting of the 1st respondent held on 13 April 1996, said that they did not make any decision to not extending the applicant's contract at the meeting held on 13 April 1996. (See exh. "V6" attached to the applicant's affidavit affirmed on 25 March 1999.) Despite this letter dated 24 April 1996, signed by six out of the ten council members who attended the meeting on 13 April 1996, the Honorary Acting Secretary of the 1st respondent did not withdraw his letter dated 14 April 1996 to the applicant. On the contrary, the Honorary Acting Secretary of the 1st respondent forwarded the applicant a cheque for three months salary *in lieu* of notice together with the applicant's half-month's salary for April 1996 *vide* a letter dated 24 April 1996. (See exh. "V7" attached to the applicant's affidavit affirmed on 25 March 1999.) By a letter dated 30 April 1996, the applicant informed the 1st respondent that he was accepting the payment to him without prejudice to his rights to claim that he had been unfairly dismissed from service. (See exh. "V8" attached to the applicant's affidavit affirmed on 25 March 1999.) *Vide* a circular resolution dated 22 July 1996, circulated by the Honorary Acting Secretary of the 1st respondent, the executive council of the 1st respondent was required to signify their acceptance or rejection of the following:

> Re: Mr M Vasagam's Position
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> In accordance to Rule 12(5) of the Union Constitution, all Executive Council members are required to make a decision as to whether it is agreeable not to

> extend Mr. Vasagam's Fixed Term Contract due to the current financial constraints and Current EXCO is capable to manage and run this Union independently and more effectively.

(See exh. "V9" attached to the applicant's affidavit affirmed on 25 March 1999.)

Even the decision made pursuant to the circular resolution was illegal because the said circular resolution was not reported by the secretary to the executive council meeting and recorded in the minutes thereof, in clear breach of r. 12(6) of the Rules and Regulations of the 1st respondent. None of these decisions which were made subsequent to the 1st respondent's letter dated 14 April 1996 dismissing the applicant from service, were communicated to the applicant. Being dissatisfied with his termination from service, the applicant lodged representations at the Industrial Relations Department to seek the remedy of reinstatement under s. 20 of the Industrial Relations Act 1967. As the applicant's dispute with the 1st respondent could not be resolved, the Honourable Minister of Human Resources referred the applicant's dispute with the 1st respondent to the 2nd respondent for adjudication. The matter was registered as Industrial Court Case No. 7/4-541/96. As required the applicant filed his statement of case dated 3 February 1997. (See exh. "V10" attached to the applicant's affidavit affirmed on 25 March 1999.) In response, the 1st respondent filed its statement in reply dated 6 March 1997. (See exh. "V11" attached to the applicant's affidavit affirmed on 25 March 1999.) The 1st respondent subsequently filed an amended statement in reply dated 24 September 1997 wherein at para. 13 the 1st respondent for the first time furnished a reason for the non-renewal of the applicant's contract of employment as follows:

> The Union refers to paragraph 4 of the Statement of Case and denies the averments contained therein and puts the Claimant to strict proof thereof. The Union avers and will so submit at the hearing that it did not renew the Claimant's contract of employment as provided for in the contract of service entered into between the Claimant and the Union in view of the fact that it felt that it was able to carry out its functions without the services of an executive secretary and in order to reduce its operating expenses and therefore the question of dismissal without just cause or excuse does not arise. The Union avers will so submit at the hearing that it exercised its right under the contract entered into with the Claimant not to renew the contract, the facts and circumstances leading to which are as follows:
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> (See exh. "V12" attached to the applicant's affidavit affirmed on 25 March 1999.)

The matter came up for hearing on 29 and 30 September 1997, 18 and 19 August 1998, 30 September 1998, 17 December 1998, 27 January 1999

and 8 February 1999. During the course of the proceedings before the 2nd respondent, both parties produced exhibits. (See exh. "V13" attached to the applicant's affidavit affirmed on 25 March 1999.) The 1st respondent's solicitors produced an outline of their submissions in support of their oral submissions. (See exh. "V14" attached to the applicant's affidavit affirmed on 25 March 1999.) *Vide* Award No. 91 of 1999 dated 1 March 1999, the 2nd respondent handed down a decision against the applicant and dismissed the applicant's action. (See exh. "V15" attached to the applicant's affidavit affirmed on 25 March 1999.).

In handing down his award, the learned chairman held that the applicant's contract of employment was a genuine fixed term contract of employment and therefore the first respondent has a right to not renew the said contract upon expiry. Section 33B(1) of the Industrial Relations Act 1967 has enacted a privative clause precluding *certiorari* in respect of any award, decision or order of the Industrial Court under the Act. However, it was held by the Supreme Court in *Malayan Banking Berhad v. Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) 183 that a privative clause of this nature is not operative in the face of jurisdictional defect or fraud and has no effect at all as regards judicial review. A decision of the Industrial Court could be subjected to *certiorari* proceedings. It will be proper to treat a decision-maker's task of fact finding and the drawing of factual inferences from established facts as falling within the jurisdiction of the decision-maker unless the decision-maker has reached absurd results or reached results absurdly or the decision-maker had acted upon an incorrect basis of fact. Their decisions are susceptible to judicial review not only on ground of procedural impropriety, illegality and irrationally but that the courts are permitted to scrutinise such decisions not only for process but also for substance (see *R Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147). In *Hotel Equatorial (M) Sdn Bhd v. National Union of Hotel, Bar & Restaurant Workers & Anor* [1984] 2 CLJ 6; [1984] 1 CLJ (Rep) 155 it was held that:

> ... in the exercise of its inherent supervisory jurisdiction over inferior tribunal of limited jurisdiction the High Court must always remember that it is not sitting as a Court of Appeal to review the findings of the inferior tribunals. The High Court, it must be observed, has no jurisdiction to consider the merits of the case; it's only function is to consider whether the inferior tribunal has performed its duties according to law. A clear distinction must be maintained between want of jurisdiction and the manner of its exercise, otherwise review for jurisdictional error will be equivalent to review on merit.

In *Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9, the Court of Appeal has once again emphasised the role of the High Court in judicial proceedings, in relation to findings of facts, as follows:

> Appellate inference
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> Mr Sivabalah in supporting the learned judge's judgment has relied on two decisions of this Court. The first of these is *Amanah Butler (M) Sdn Bhd v. Yike Chee Wah* [1997] 2 CLJ 79 where we upheld the decision of the High Court quashing an award on the ground the Industrial Court had failed to take into account certain documents that were relevant and material to the decision-making process. The second is *Swedish Motor Assemblies Sdn Bhd v. Hj Md Ison bin Baba* [1998] 3 CLJ 288 also a case of constructive dismissal, being a resignation under duress. It was held in that case that the High Court had not exceeded its jurisdiction by reviewing an award for substance.
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> Our response to Counsel is that each case depends upon its own facts for the appropriate legal result. It is to be noted that neither *Amanah Butler* nor *Swedish Motor Assemblies* were cases that turned upon credibility of evidence. Such findings are in our judgment immunised from judicial review: *William Jacks & Co (M) Sdn Bhd v. S Balasingam* [1997] 3 CLJ 235. Whether a High Court has exercised appellate functions depends upon the approach taken in a particular case. If a judge to whom application is made for *certiorari* inquires into and disturbs findings of fact based on the credibility of witnesses, he does indeed exercise appellate functions. It is important to remember that in judicial review proceedings the High Court must accept as gospel findings of fact made by the Industrial Court based on credibility of witness. As was observed by Mohd Azmi FJ in *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd and Another Appeal* [1995] 3 CLJ 344 at p. 348:
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> > In exercising judicial review, the High Court was obliged not to interfere with the findings of the Industrial Court unless they were found to be unreasonable, in the sense that no reasonable man or body of men could reasonably come to the conclusion that it did, or that the decisions of the Industrial Court looked at objectively, were so devoid of any plausible justification that no reasonable person or body of persons could have reached them (see Lord Denning's judgment in *Griffith (Inspector of Taxes) v. JP Harrison (Watford) Ltd* [1962] 1 All ER 909 at p. 916, and judgment of Lord Diplock in *Bromley London Borough Council v. Greater London Council & Anor* [1983] 1 AC 768 at p. 821; [1982] 1 All ER 153 at p. 159; [1982] 2 WLR 92 at p. 100).
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> It is the ultimate decision of the Industrial Court when looked as a whole that matters. That is the approach suggested by so learned a judge as Mohd. Azmi FCJ (as he was then). It is a view plainly binding upon this Court.

Unfortunately, the learned judge in the present appeal overlooked the limits to the jurisdiction he was called upon to exercise.

I am of the opinion that this court should be slow to interfere with the findings of the Industrial Court made on the facts of the case based on the credibility of witnesses. It would be pertinent to note that the applicant's entire submission is based on an attack of the findings of facts made by the Industrial Court based on the credibility of witnesses. The applicant contends that the Industrial Court erred in law when it doubted the testimony of Mr Ong Hock Lee (who was a witness for the applicant) who stated in court that he informed the applicant that he "could work for as long as he liked" with the first respondent. I think such a contention has no place in an application for judicial review, where it is trite law that findings of facts based on the credibility of witnesses cannot be challenged. The Industrial Court expressly stated that the testimony by the abovesaid witness was doubted and therefore his version of the facts were rejected. The applicant therefore should not challenge the Industrial Court's findings of facts which were based on credibility of witnesses.

The applicant also submitted by making a bare assertion that his contract was "not a genuine fixed term contract" "as a result of the nature of his duties as an executive secretary". However, the applicant failed to show how the Industrial Court committed an error of law in its decision-making process on the issue whether there was a genuine fixed term contract. The applicant failed to show under which head of grounds for judicial review the Industrial Court's alleged error of law falls under ie, whether in the category of procedural impropriety, illegality or irrationality. The applicant instead contends that on the facts of the case, due to the nature of the applicant's duties as an executive secretary, his contract was therefore not a genuine fixed term contract. I am of the view that this contention is a clear example where the Applicant banks on challenging a finding of fact to quash the Industrial Court's award in the guise of an application for judicial review. It is observed that the Industrial Court had examined at length on the facts of this dispute on whether the contract concerned was a genuine fixed term contract. The applicant relied on the case of *Han Chiang School, Penang Han Chiang Associated Chinese Schools Association v. National Union of Teachers in Independent Schools, W. Malaysia* [1988] 1 ILR 611 ("the *Han Chiang* case"). It is noted that this case was also relied on at the Industrial Court and in fact mentioned in its award. It is observed that in the *Han Chiang* case the Industrial Court made a finding that the system of fixed term contracts in the school was employed not out of a genuine necessity but as a means of control of the teachers concerned. The intention of the school was to rid itself of the union, which was why the school relied on the fixed term contracts to flush out the teachers

who were members of the union. The *Han Chiang* case therefore can be distinguished from the instant case as in the instant case, the Industrial Court upon examining the facts of the case found that there was a genuine fixed term contract.

The applicant submitted that the decision of the first respondent to not renew the applicant's contract of employment was procedurally wrong and hence in the circumstances, the said decision was made unlawfully. I think the question that arises is whether such a ground is valid in the first place in seeking judicial review over the decision of the Industrial Court? If the "procedural impropriety" complained of, is attributed to the Industrial Court, then it is accepted that it is a valid ground to consider in the instant application. However, this is not the case here. The applicant complains of procedural error not on the part of the Industrial Court but of the first respondent. Procedural impropriety can only be a ground for judicial review, where the procedural error was committed by the Industrial Court in making the award. It is the decision-making process of the Industrial Court which is to be focused on in an application for judicial review for the purpose of quashing its award. In *Minister of Home Affairs v. Persatuan Aliran Kesedaran Negara* [1990] 1 CLJ 699; [1990] 1 CLJ (Rep) 186, ("*Aliran*'s case") the three categories of grounds on which judicial review may be applied for are illegality, irrationally and procedural impropriety. It is clear from *Aliran*'s case, that it is the administrative actions of an administrative tribunal which is subject to judicial review under the abovesaid grounds. Therefore the first respondent's decision-making process cannot be called into question in an application for judicial review before a High Court. It is only the Industrial Court's decision which can be challenged in such an application. I think this ground is therefore misconceived and is hereby struck off. The first respondent did not commit any procedural error in its decision to not renew the applicant's contract of employment as alleged. This complaint was also raised by the applicant at the hearing before the Industrial Court and the Industrial Court reached the conclusion that even if there were such an irregularity, the ultimate issue remains whether or not the contract was a genuine fixed term contract, and that since there was a genuine fixed term contract, whatever irregularities complained of has no bearing on the question of the claimant's contract coming to an end. As there was a valid and genuine fixed term contract, the facts remains that the said contract would expire once it comes to an end.

The applicant's third ground is that the learned chairman appeared to have accepted the first respondent's reason of terminating the applicant's contract of service as a valid reason for the non-renewal of the applicant's contract of employment despite admission by the first respondent that the first respondent

was not alleging that the applicant's job was redundant. The applicant also contended that the learned chairman failed to appreciate that the reason given by the first respondent for terminating the applicant's contract was an unlawful reason. It is observed that the first respondent is not disputing the fact that in the first respondent's letter of non-renewal of contract dated 14 April 1996, the first respondent did not state any reason for the said non-renewal of the applicant's contract. In the first place, I think the first respondent is under no obligation to state any reasons for the non-renewal of a fixed term contract as it was clear to both parties that the fixed term contract was to expire by a specified date. The reason for the non-renewal was nevertheless minuted in the meeting held by the first respondent on 13 April 1996. It is noted that the first respondent's reason for not renewing the said contract was because it was able to carry on its functions without the services of the executive secretary, having had the benefit of the first respondent's expertise in union matters. The Industrial Court was of the view that this reason was good enough for not renewing the applicant's contract. It is also noted that the applicant's contention that the reason advanced by the first respondent for the non-renewal of the applicant's contract implied redundancy was rejected by the Industrial Court itself. I come to the conclusion that the fact that a finding was reached and that there was a genuine fixed term contract between the first respondent and the applicant would make the whole issue of whether or not there were good reasons to not renew the said contract irrelevant.

The applicant's fourth ground is that the Industrial Court had erred in law concerning the failure of the first respondent to call the president of the first respondent as a witness to rebut the applicant's testimony. This was of little consequence in light of the finding of fact that the applicant's contract of employment was a genuine fixed term contract. The applicant contended that the first respondent's president harboured ill-will towards him and that therefore he had ulterior motives for non-renewal of his contract. The burden was therefore on the applicant to prove the same. The burden on the first respondent was limited to only establishing before the court that the contract in question was a genuine fixed term contract and that therefore the expiry of the same is not a termination of the applicant's services without just cause or excuse. Section 101(1) of the Evidence Act 1950 states that, "(1) Whosoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist".

Section 103 of the Evidence Act 1950 also states that the burden of proving any particular fact lies on the person who wishes the court to believe in its existence. Hence the burden is clearly on the applicant to prove that the president of the first respondent had ulterior motive or harboured ill-will against

him resulting in the non-renewal of his contract. Therefore it is not for the first respondent to produce the said president as a witness at the Industrial Court. The applicant contended that the Industrial Court had not applied the correct test in making its decision by first asking itself whether there was a dismissal and secondly that if there was a dismissal, whether the dismissal was with just cause or excuse. I am of the opinion that the Industrial Court had correctly addressed the issue in this case by determining first whether or not the contract in question was a genuine fixed term contract (see pp. 3 and 4 of the said award). If the Industrial Court made a finding that it was not a genuine fixed term contract but was really a contract of employment, then only would the Industrial Court be required to ask whether there was a dismissal or not and that if so whether it was with just cause or excuse. In the instant case, since a finding was reached that the contract concerned was indeed a genuine fixed term contract, the question of there being a dismissal or not does not arise. Once it was established that there is a genuine fixed term contract, the dissolution of the contract upon reaching the expiry date of the fixed term would clearly spell the end of the worker's tenure with the relevant company.

The applicant's fifth ground is that the second respondent failed to award the applicant contractual benefits due to the applicant which the first respondent failed to pay upon the termination of the applicant from service. As I stated earlier this ground does not even qualify as a ground to be raised in an application for judicial review. The Industrial Court have made its decision correctly upon having examined the facts of the case and applying the right approach by first determining the nature of the contract between the applicant and the first respondent. Having found the contract to be a genuine fixed term contract, the Industrial Court rightly disposed of the dispute without going into the irrelevant question whether there was a dismissal and whether it was with just cause or excuse.

For these reasons the application is dismissed with costs.